EDMUND G. BROWN JR., Attorney General
of the State of California
LINDA K. SCHNEIDER
Supervising Deputy Attorney General
SHERRY L. LEDAKIS, State Bar No. 131767
Deputy Attorney General
110 West "A" Street, Suite 1100
San Diego, CA 92101

P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2078
Facsimile: (619) 645-2061

Attorneys for Complainant

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: KELLY LYNN ANDREWS 864 North 2nd Street, #125 El Cajon, CA 92021 Pharmacy Technician Reg. No. TCH 65210 Respondent.	Case No. 3268 **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

2. On or about October 6, 2005, the Board of Pharmacy issued Pharmacy Technician Registration Number TCH 65210 to Kelly Lynn Andrews (Respondent). The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on April 30, 2009, unless renewed.

///

///

JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4300, subdivision (a) of the Code states that every license issued may be suspended or revoked.

5. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY REFERENCES

6. Section 490 of the Code provides, in pertinent part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued..

7. Section 493 of the Code states:

> Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.
>
> As used in this section, "license" includes "certificate," "permit," "authority," and "registration."

8. Section 4301 of the Code states:

> The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

. . . .

(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

. . . .

(j) The violation of any of the statutes of this state, or any other state, or of the United States regulating controlled substances and dangerous drugs.

. . . .

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

. . . .

9. Section 4022 of the Code states:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.

///

///

10. Section 4059 of the Code states, in pertinent part, that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.

11. Section 4060 of the Code states:

> No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7,or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

. . . .

12. United States Code, title 21, section 843 states, in pertinent part:

(a) It shall be unlawful for any person knowingly or intentionally --

. . . .

> (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

. . . .

REGULATORY PROVISIONS

13. California Code of Regulations, title 16, section 1770 states:

> For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

///

///

///

///

14. California Code of Regulations, title 16, section 1769 states:

. . . .

(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) Evidence, if any, of rehabilitation submitted by the licensee.

COST RECOVERY

15. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUGS

16. Alprazolam, also known by the brand names Xanax and Nivaram, is a Schedule IV controlled substance under California Health and Safety Code section 11057, subdivision (d)(1), and is classified as a dangerous drug pursuant to Business and Professions Code section 4022.

17. Hydrocodone bitartate/acetaminophen, also known by the brand names Vicodin, Norco, and Lortab, is a Schedule III controlled substance as designated by Health and Safety Code section 11056, subdivision (e)(4), and is a dangerous drug pursuant to Business and Professions Code section 4022.

18. Codeine/APAP, a combination of codeine and acetaminophen, is a Schedule III controlled substance as designated by Health and Safety Code section 11056, subdivision (e), and is a dangerous drug pursuant to Business and Professions Code section 4022.

19. Phentermine, also known by the brand name Adipex-P, is a schedule IV controlled substance as designated by Health and Safety Code section 11057, subdivision (f)(4), and is a dangerous drug pursuant to Business and Professions Code section 4022.

20. Soma, sold generically as carisoprodol, is a Schedule IV controlled substance under Health and Safety Code section 11057, subdivision (d)(17), and is a dangerous drug pursuant to Business and Professions Code section 4022.

21. Phenobarbital is a Schedule IV controlled substance as designated by Health and Safety Code section 11057, subdivision (d)(26), and is a dangerous drug pursuant to Business and Professions Code section 4022.

FACTS

22. Respondent was employed as a pharmacy technician at a CVS Pharmacy in Imperial Beach, California, from November 16, 2006 until she was terminated on December 19, 2007.

23. On or about October 23, 2007, as part of his standard practice, a CVS Pharmacy Loss Prevention Specialist (LPS) reviewed the regional CVS pharmaceutical inventory and noted that the Imperial Beach CVS showed a significant shortage of Hydrocodone and Carisoprodol dating from August 11 to October 19, 2007. Unaccounted for were a total of 111 bottles (containing 100 tablets each) of Hydrocodone retailing for $67.59/bottle, and eight bottles (containing 500 tablets each) of Carisprodol retailing for $294.99/bottle. On or about October 24, 2007, the LPS contacted the store's pharmacy manager and alerted her to the missing drugs and directed her to keep a running tab on the amount of Hydrocodone on the shelf versus what was dispensed. One week later, the pharmacy manager reported that numerous bottles of Hydrocodone were missing. The LPS directed surveillance cameras to be installed in the pharmacy directly above the area where the Hydrocodone and Carisoprodol were kept.

24. Closed-circuit surveillance of the area was conducted from November 7 to November 25, 2007. Respondent was observed removing controlled substances from the pharmacy shelves and concealing them on her person as follows:

///

a. November 7, 2007 at 1403: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

b. November 10, 2007 at 1538: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

c. November 11, 2007 at 1853: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

d. November 12, 2007 at 1530: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

e. November 12, 2007 at 1733: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

f. November 15, 2007 at 1503: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

g. November 15, 2007 at 1506: Respondent took a bottle from the shelf where the Hydrocodone was located and concealed the bottle inside the front of her pants.

h. November 23, 2007 at 1925: Respondent took a bottle from the shelf where the Carisoprodol was located and placed it on an aisle shelf.

i. November 23, 2007 at 1933: Respondent took the bottle of Carisoprodol from the aisle shelf and poured its contents into a vial located inside the front of her pants. Respondent returned the bottle to the shelf.

j. November 25, 2007 at 1629: Respondent took a bottle from the shelf where the Lortab was located and concealed the bottle inside the front of her pants.

25. Based on the evidence obtained by the surveillance camera, on or about December 9, 2007, agents from the Bureau of Narcotics Enforcement (BNE) followed Respondent home from work and confirmed her place of residence in El Cajon. The agents obtained a search warrant from the San Diego County Superior Court for Respondent's residence and vehicles.

26. On or about December 11, 2007, BNE agents met with Respondent while she was working at the CVS Pharmacy and placed her under arrest for theft of controlled

substances. Respondent was searched and an agent located an unopened bottle of Hydrocodone concealed in the crotch area of Respondent's pants, as well as two tablets of Soma and one tablet of Hydrocodone in the left front pocket of her pants. The agents conducted an audit of the pharmacy's records and confirmed that Respondent did not purchase the items found on her person, and she did not have a valid prescription for the items.

27. On or about December 11, 2007, the agents executed a search warrant of Respondent's vehicle, a Jaguar. Agents located one unlabeled bottle containing 93 tablets of Soma under the driver's seat, one unlabeled bottle containing 27 tablets of Soma in the center console, along with two unlabeled bottles containing 14 tablets and 10 tablets of Hydrocodone, respectively, as well as three loose tablets of Soma. There were no receipts found in the vehicle indicating the prescription drugs had been purchased by Respondent.

28. The agents transported Respondent to her El Cajon residence and executed a second search warrant. Respondent's husband was home at the time of the search and told the agents he had no knowledge of his wife's involvement in stealing prescription drugs from CVS even though two large unlabeled bottles containing Hydrocodone and Soma were found inside his lunch box. As a result of the search of Respondent's residence and another vehicle registered to her, agents located a large quantity of Hydrocodone, Soma, and Phenobarbital. Respondent was booked and transported to jail.

29. In a signed statement dated December 19, 2007, Respondent admitted to CVS Pharmacy investigators that she hid drugs in her pants almost every day she worked and took them home to share with her husband. Respondent signed a promissary note to pay CVS restitution in the amount of $12,273.73. An audit revealed a shortage of 995 tablets of acetaminophen wtih codeine, 1880 tablets of Alprazolam, 27,291 tablets of Hydrocodone, 170 tablets of Niravam, 495 tablets of Phentermine, and 200 tablets of Vicodin.

///

///

///

///

FIRST CAUSE FOR DISCIPLINE

(March 21, 2008 Criminal Conviction for Commercial Burglary & Possession of Controlled Substances for Sale)

30. Respondent subjected her registration to discipline under sections 490 and 4301, subdivision (l) of the Code in that she was convicted of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

a. As a result of Respondent's arrest described in the facts set forth above, on or about March 21, 2008, in a criminal proceeding entitled *People of the State of California v. Kelly Lynn Andrews*, in San Diego County Superior Court, case number CD211137, Respondent was convicted on her plea of guilty for violating Health and Safety Code section 11351, possession of controlled substances for sale, and Penal Code section 459, second degree commercial burglary, felonies.

b. As a result of the conviction, on or about August 5, 2008, Respondent was sentenced to 180 days in custody, credit for two days served, stayed pending successful completion of three years formal probation, payment of $1,840 in fees and fines. The court ordered Respondent pay $12,373.29 in restitution to CVS Pharmacy. Respondent was further ordered to attend and complete a drug rehabilitation program.

SECOND CAUSE FOR DISCIPLINE

(Commission of Acts Involving Moral Turpitude, Dishonesty, Fraud & Deceit)

31. Respondent has subjected her registration to disciplinary action under section 4301, subdivision (f) of the Code in that between or about August 2007 and December 2007, while working as a pharmacy technician, Respondent stole controlled substances and dangerous drugs from her employer, CVS Pharmacy, acts involving moral turpitude, fraud, deceit, and dishonesty, as detailed in paragraphs 22-29, above, which constitutes unprofessional conduct.

///

///

THIRD CAUSE FOR DISCIPLINE

(Violation of California Statutes Regulating Controlled Substances & Dangerous Drugs)

32. Respondent has subjected her registration to disciplinary action under section 4301, subdivision (j) of the Code in that between or about August 2007 and December 2007, while working as a pharmacy technician, Respondent knowingly violated Business and Professions Code sections 4022, 4059, and 4060 regulating controlled substances and dangerous drugs, as detailed in paragraphs 22-29, above, which constitutes unprofessional conduct.

FOURTH CAUSE FOR DISCIPLINE

(Violation of Federal/State Laws & Regulations Governing Pharmacy)

33. Respondent has subjected her registration to disciplinary action under section 4301, subdivision (o) of the Code in that between or about August 2007 and December 2007, while working as a pharmacy technician, Respondent violated Title 21 United States Code section 843, subdivision (a)(3), Board of Pharmacy Regulations (California Code of Regulations, Title 16, Section 1700, et seq.), and the California Uniform Controlled Substances Act (Health and Safety Code 11000, et seq.), as detailed in paragraphs 22-29, above. Such violations constitute unprofessional conduct.

///

///

///

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

Revoking or suspending Pharmacy Technician Registration Number TCH 65210, issued to Kelly Lynn Andrews;

2. Ordering Kelly Lynn Andrews to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: 4/16/09

VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

SD2009803615